IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

KALYAN SINGH VS. MOHAN LAL

S.B.CIVIL SECOND APPEAL NO.201/2005

DATE OF JUDGMENT : 27th OCTOBER, 2006

PRESENT
HON'BLE MR.JUSTICE N.P.GUPTA

Mr. S.D.Purohit, for the appellant.
Mr. R.K.Thanvi, for the respondent.

BY THE COURT:-

This second appeal has been filed by the defendant, against the judgment and decree of the learned courts below; decreeing the plaintiff's suit for eviction of the appellant from the suit shop, on the ground of non-user of the premises, for a period of six months.

The facts of the case are, that the plaintiff filed the present suit for eviction on 14.10.1993, alleging inter alia, that the suit shop was let out to the defendant for carrying on the motor parts business, on a monthly rent of Rs. 75/-. However, for the last about 3 years the defendant has stopped carrying on any business therein, and the shop remains completely closed, under lock. It was also

alleged, that the defendant is not using the premises without any reasonable cause, and the defendant has shifted his business in Gehlot Bhawan, Near Dale Khan Ki Chakki, Pal Road, which premises has been taken on rent by him, and at this new place the defendant is having his office. The defendant has also changed his business, and has started the work of taking government contracts. It is also alleged, that on account of non-user, electricity connection has also been disconnected. According to the plaintiff, the defendant has not paid rent after October, 1992. Thus, he is a defaulter. Interalia with these averments, the decree for eviction was prayed.

Defendant contested the suit by filing written statement. It was pleaded, that it is not correct to allege, that the shop was taken on rent for carrying on motor part business, rather the shop was taken for carrying on business, and the defendant could carry on any business, as it suits his convenience. Then, the averments of para-2 were denied, being without any basis, and malafide. It was contended, that after taking the premises on rent, the defendant carried on business of auto parts for some time, however, since the motor parts business is not reasonably lucrative, therefore, the defendant is carrying on business of patching puncture, wherefrom he is maintaining his family, and that the defendant has not at all stopped carrying on any business in the shop. It was denied that

electrical connection was disconnected. It was pleaded, that it is still subsisting. Then, the allegations of default were also denied, and it was prayed that the suit be dismissed.

Learned trial court framed three issues. The first issue was regarding default, second issue was, as to whether, the defendant is not using the suit premises for the last three years, and the premises are lying closed, and if so, whether the plaintiff is entitled to decree for eviction on that ground.

Learned trial court after considering the evidence led on the side of the either parties, deciding issue no. 2 found, that since the defendant has not used the premises without any satisfactory reason for a period of six months, and therefore, he is liable to be evicted. For arriving at this conclusion, it was inter alia considered, that the defendant has not produced any accounts of his business, being carried on in his shop, nor any evidence in that regard has been produced, while from the plaintiff’s evidence it is clear, that the defendant is not doing any business in the shop, and that, from the documents available on record, it is clear, that the electricity supply is disconnected. Then, deciding issue no.1 it was found, that the defendant is a defaulter, and was given the benefit of first default. Learned lower

Appellate Court also discussed the evidence in detail, and affirmed the finding of the learned trial court.

Vide order dt. 27.2.2006, record of the learned courts below was requisitioned, while the plaintiff respondent has appeared as a caveator.

Assailing the impugned judgments and decrees, it was contended, that the provisions of Section 13(1)(j) of the Rajasthan Premises (Control of Rent & Eviction) Act, hereafter referred to as the Act, require, that the suit premises has not been used for the purpose for which it was let out, at least for a period of six months, immediately before filing of the suit, while in the present case, there is no pleading whatever in this regard, inasmuch as, all that has been pleaded in para-2 of the plaint is, that the premises are not being used for approximately three years. Likewise, the learned courts below have also found the premises to have not been used for a period of six months, but it has no where been found, that the premises were not used for six months, immediately before filing of the suit, and therefore, even on the findings of the learned courts below, as they are, the suit could not be decreed, on the ground of Section 13(1)(j) of the Act, and the decree is liable to be set aside. Carrying the argument further, it was contended, that there is no direct evidence of the plaintiff, about the shop having remained closed for the

period 14.4.1993 to 13.10.1993, i.e. six months immediately before filing of the suit, and therefore, the decree could not be sustained. The next submission made was, that the requirement of Section 13(1)(j) is, that the premises should not have been used for the requisite period, requirement is not, about tenant having not used the premises. In the present case, since the premises are being used by the tenant, through his person, who does the job of patching punctures, it cannot be said, that the premises have not been used for the last six months, even if it was to be assumed, that the tenant has not used premises for his personally. The next submission made was, that the learned courts below have proceeded on a basically wrong premises, inasmuch as, they proceeded with the assumption, that the burden is on the defendant, to prove, that he has used the premises, and from that stand point, have considered the material, and concluded, that the defendant has failed to prove, while it is established law, that the burden is on the plaintiff, to positively prove, rather plead, and prove, the ground enumerated in Section 13(1)(j). Thus, the findings are vitiated on account of this basically wrong approach. The next submission made was, that the findings are out come of misreading of the evidence, and rather some of the findings are based on no evidence whatsoever. Likewise, some evidence on record has not at all been discussed by the learned trial court, especially that of P.W.2. Similarly the findings of the

learned lower Appellate Court also suffer from misreading of the record, and are therefore, liable to be interfered with in the second appellate jurisdiction. The learned counsel relied upon few case laws, being that of Hon'ble the Supreme Court, in Bhagwan Sharma Vs. Bani Ghosh reported in 1993 Suppl.(3) SCC-497, Leela Soni Vs. Rajesh Goyal reported in (2001)7 SCC-494, Rohini Prasad Vs. Kasturchand reported in (2000)3 SCC-668, and Neelakantan Vs. Mallika Begum reported in (2002) 2 SCC-440. Learned counsel also relied on some judgments of this Court, being in Pooran Mal Vs. Rahman reported in 1992(1) RCJ-452, Gauri Lal Vs. Gujar Mal reported in 1992(1) WLC (Raj.)-437, Sant Lal Vs. Harbans Singh reported in 1982 RLW-274, and also judgment of Punjab and Haryana High Court Balwant Singh Vs. Gurdial Singh reported in 1972 RCJ-281, and the judgment of Bombay High Court in Achut Pandurang Kulkarni Vs. Sadashiv Ganesh Phulambrikar reported in AIR 1973 Bombay-210.

Learned counsel for the respondent, on the other hand, supported the impugned judgment, and carried me through the entire evidence on record, and submitted, that the burden of proof was placed on the plaintiff initially, who has discharged the burden, thereafter it was shifted on the defendant, as it was within his special knowledge, that he was carrying on business, and from that aspect, the learned courts below expected the evidence from the defendant, and thus the finding is not vitiated. Learned

counsel relied upon few judgments of this Court, in, Smt. Kamla Rai Vs. Smt. Santosh reported in 2006(4) RDD-2239 (Raj.), M/s. Om Prakash and Company Vs. Jawari Lal reported in 1996(1) RLW (Raj.)-232, and Agarwal Trader Vs. Smt. Chand Devi reported in 2004(2) RCR-343. It was then submitted, that the plaintiff has clearly deposed about the shop being closed for the last three years, on this part of the testimony he was not at all cross-examined, and therefore, the submissions made by the learned counsel for the appellant are not open to him. Then, referring to the statement of D.W.1, it was submitted, that in the examination in chief, the defendant has deposed to be carrying on business himself on the shop, while in the cross-examination he has admitted, that Parminder is working on the shop, and this Parminder has not been examined, which clearly shows, that the shop is closed for the requisite period of time. Regarding misreading, it was submitted, that there is no misreading, rather the entire evidence have been correctly discussed by the learned lower Appellate Court, to arrive at the conclusion, and there is clear evidence regarding existence of ground under Section 13(1)(j). Alternatively, it was submitted, that the findings of the learned courts below, about non user of the premises for six months, is required to be considered, as taking non-user for six months, immediately before filing of the suit, as parties had gone to trial, ad idem, on the controversy about non-user of the premises for the period

of six months, immediately before filing of the suit. It was contended by the learned counsel, that so far disconnection of electricity is concerned, of course there is no document on record, but then, from collective reading of the evidence of the parties, it is clear, that the electricity connection had been disconnected, therefore also, the finding does not require any interference.

In rejoinder, the learned counsel tried to distinguish the judgments cited by the learned counsel for the respondent, and reiterated the submissions made in the opening arguments.

I have considered the submissions, and have gone through the record.

First of all, I may deal with the judgments cited at the bar.

So far the judgments of Hon'ble the Supreme Court in the cases of Bhagwan Sharma, Leela Soni, Rohini Prasad and Neela Kantan, are concerned, they are on the aspect of permissible scope of interference in second appellate jurisdiction. The principles propounded in these cases are not in dispute, as such I need not detain myself on them.

Then, coming to Pooran Mal's case, therein this Court has held, that ground of eviction under Section 13(1)(j) is, that it must be established, that there was not only non user, but such non user was continuous for a period of six months, counted from the date of suit, immediately preceding that date. Then, on facts it was considered, that the case of the plaintiff was, that the tenant was in Calcutta during 1979, 1980, and 1981, and the premises were not used during this period, and without there being any plea or evidence on the side of the landlord, about non-user of the premises, continuously for a period of six months, immediately before the date of the suit, the decree was passed, concluding non-user for a period of six months immediately before the date of the suit, simply from the fact, that the tenant remained in Calcutta during 1979, 1980 and 1981. It was also considered, that the notice Ex.-3 was sent on behalf of the plaintiff at the Sikar address of tenant, in April, 1981, and the same was received by the tenant at Sikar on 27.4.1981, and the summons of the suit, sent at Calcutta address were returned, with the remarks "left", and a copy of the summons, which was sent at Sikar address, was served upon him on 1.10.1981. Interalia in this background, the decree on the ground of section 13(1)(j) was set aside.

In Gauri Lal's case, the same learned Single Judge held, that before Section 13(1)(j) can be used for

passing a decree of eviction, the court must feel satisfied, that the tenant has not used the premises for continuous period of six months immediately preceding date of suit, and that, the landlord cannot take the ground of non-user in remote past, as basis for seeking eviction of tenant. It was also held, that the vague and bald assertion about non user of shop for years together are not sufficient, for holding, that tenant has not been using the tenanted premises continuously for a period of six months immediately before date of suit. The facts in that case were, that the suit was filed on 17.12.1980, inter alia on the ground of reasonable and bonafide necessity, tenant not doing any business in the shop, keeping it closed, tenant himself being owner of four shops, and having sold two shops, and subletting etc. Regarding non user, it was only alleged, that the defendant does not carry on any business, and is always keeping the premises closed. Then, in para-3 it was pleaded, that the defendant keeps the shops closed, and let out the Chabutra. While the defendant contended, that he himself carries on business, and does not keep it closed. Thus, on these averments, it was found as above, and then, even appreciating the evidence, it was found, in para-19, that there is no evidence on record to establish the landlord’s case, with reference to requirement of Section 13(1)(j).

Then, in Balwant Singh's case, the premises were locked, and were closed for a period of more than four months, and it was found on material on record, that the premises were continuously in use, though the tenant himself did not stay there, and therefore, it was found, that it might be a case of assignment of the lease, but cannot be said to be a case of non-user.

Then, in Achut's case, the tenant had been transferred, and he was continuing to pay rent, and it was found, that the tenant had shifted temporarily to the place of his transfer, but he was regularly paying rent and electricity charges, it cannot be said, that he intended to stop the use of the premises for his own use. Then, non-user on account of transfer cannot be said to be without any reasonable cause. In my view, two judgments in Balwant Singh's case, and Achut's case, are of no relevance to the controversy involved in the present case.

Then, in M/s. Om Prakash's case, the allegation was, that Kotha was not being used for over six months, and remained closed, and the material on record showed, that the tenant had written a letter to the S.D.O. on his letter head, conveying that he has vacated the premises of the landlord, and has started business in Krishi Mandi. Likewise there was other evidence also to show, that for the last four to five years the business was shifted. Then,

it was also found, that electricity supply was disconnected for the last 7 years, and telephone had also been shifted to Mandi. On those facts, the argument made by the counsel for the appellant, about absence of any pleading, or issue, about non-user of the premises for the last six months immediately before filing of the suit, was negatived, by holding, that issue framed was wide enough to cover the grounds, and that the parties to the lis are vigilant enough, knowing fully well the points involved, and led evidence thereon, hence the finding cannot be interfered with.

Then, in Agrawal Trader's case, the plea was about the shop remaining closed for a continuous period of two years just before filing of the suit. After considering the judgment of this Court in Gauri Lal's case and Sant Lal's case, it was held, that mere absence of pleading about non-user of premises, for six months, is of no adverse consequence, and that the pleadings should not be construed that strictly, rather court must look at essential justice of the case, and the decree for eviction was maintained.

Then, in Kamla Rai's case again, the tenant, who was a Dentist had died, and considering the facts of that case, it was held, that the facts relating to non user of the premises, with reasonable cause, are within the special

knowledge of the tenant, and burden of proof lies on him, that non user was for sufficient cause. In this case again, the judgment in Sant Lal's case was considered, and followed.

Then, in Sant Lal's case, the plea of the plaintiff was, that the defendant has closed the shop for the last many years, which has resulted into diminishing of its value, and on account of it keeping closed for the last six years, the defendant is liable to be evicted. The defendant denied it, and pleaded that the premises was taken to be used as godown, which is being used, as the defendant is carrying on whole-sale business, the godown always remains open, and one Muneem always sits on the shop. On these averments, in para-13, this Court referred to certain previous judgments. Then, it was held, that the pleadings should not be construed very strictly, and the court must look essential justice of the case. Likewise, the judgment of Hon'ble the Supreme Court, in Madan Gopal Vs. Manraj, was considered, wherein it was held, that it is well settled that pleadings are loosely drafted in the courts, and the courts should not scrutinize the pleadings with such meticulous care, so as to result in genuine claims, being defeated on trivial grounds. Then, examining the case on merits, the judgment in Balwant Singh's case was also considered, and the evidence was also gone into, wherein it was admitted by the plaintiff's witness, in

cross-examination, that the suit shop is now being opened for the last 5-6 months. Then, it was found, that the shop remained closed for six months before filing of the suit, and was opened subsequently, much later, after filing of the suit. Then, in para-20 it was held, that the plaintiff had clearly come with the case of non-user, which was denied by the defendant, and the question, that the shop has not been closed without any reasonable cause, relates to facts, which are within special knowledge of the defendant, burden of proving such facts lies on the defendant under Section 106 of the Evidence Act. Then, earlier judgment of Hon'ble the Supreme Court, in Mohanlal Vs. Kasturi Devi, reported in 1967 Supreme Court Notes-406, was relied upon, wherein it was held, that facts necessary to establish any reasonable cause, could only be in the knowledge of the tenant, and if he did not lead any evidence to establish those facts, it was hardly the statutory duty of the Rent Controller, to give a more detailed and specific finding as to reasonable cause, for not occupying the shop. Then, few more judgments were relied upon, and it was held, that it was neither necessary for the plaintiff, to have pleaded about "without reasonable cause" nor was it necessary for him to lead evidence in this regard, and the defendant did not come, even with an alternative plea, to the effect, that the shop remained closed or was not used without reasonable cause, and the decree for eviction was upheld.

Thus, the pleadings and evidence of the parties, was required to be considered by the learned courts below, and is required to be considered by me, on the principles, propounded in the above judgments, in Sant Lal's case, M/s. Om Prakash's case, Agrawal Trader's case, Kamla Rai's case, Gauri Lal's case and Pooran Mal's case, and have to come to conclusion, one way or the other as to whether, tenant had incurred liable of eviction under Section 13(1)(j). Keeping in view the principles propounded in the judgments in M/s. Om Prakash's case, and Sant Lal's case, if the plaint is read, and the frame of issue is looked up, it would be clear, that this contention of the learned counsel for the appellant cannot be upheld, that there is no pleading, or issue, about non-user of the premises, without reasonable cause, for a period of six months, immediately before filing of the suit. Of course, so far findings are concerned, true it is, that learned courts below have found the premises to have not been used for six months, but had not specifically held, that non user was for six months, immediately before the date of the suit.

Likewise since there are contentions, and counter contentions, about misreading, and non reading of the record, and since the record has been received, on the principles propounded by Hon'ble the Supreme Court, in the various cases, relied upon by the learned counsel for the

appellant, I have ventured to go through the entire record, and re-appreciated the evidence, de novo, instead of standing to the limitation of Section 100 C.P.C.

In that view of the matter, I need not dilate on the findings recorded by the learned courts below, and I proceed to examine the issue no.2, being as to whether the defendant is not using the suit premises, for the last three years, and the premises is lying closed, and if so, whether on that ground, the plaintiff is entitled to get a decree for eviction.

I may gainfully quote the pleadings of the plaintiff in this regard, as contained in para-2 of the plaint, which reads as under:-

> "2. यह है कि उपरोक्त उल्लेखित हदूद की दुकान को प्रतिवादी ने वादी से मोटर पाटर्स का व्यापार करने हेतु किराये पर ली थी मगर प्रतिवादी ने लगभग तीन साल से इस दुकान में व्यवसाय करना बन्द कर दिया है व यह दुकान पूर्णतया ताला बन्द रहती है । प्रतिवादी द्वारा इस दुकान का कोई उपयोग व उपभोग बिना किसी उचित एवं उपरोक्त आधारों के नही किया जा रहा है । प्रतिवादी ने अपने व्यवसाय हेतु गेहलोत भवन जो कि दल्ले खॉ की चक्की के पास पाल रोड पर आया हुआ है, में परिसर किराये पर ले लिया है तथा वहा पर प्रतिवादी ने अपना कार्यालय लगा लिया है । प्रतिवादी ने विवादग्रस्त दुकान में व्यापार करना बन्द करने के उपरान्त अपना व्यवसाय भी बदल दिया है अब प्रतिवादी सरकारी ठेके लेने का कार्य करता है जिसका कार्यालय उसने उक्त उल्लेखित गेहलोत भवन में लगाया है प्रतिवादी द्वारा विवादग्रस्त दुकान का उपयोग नही करने के कारण इस दुकान का बिजली का सम्बन्ध भी विद्युत विभाग द्वारा काट दिया गया है । इस तरह विवादग्रस्त

दुकान प्रतिवादी के किसी काम में नहीं आ रही है । अत: प्रतिवादी विवादग्रस्त दुकान से काबिज बेदखली के हैं ।"

I may also quote the stand taken by the defendant, in reply to this para, contained in para-2 of the written statement, which reads as under:-

"यह कि वाद की पद संख्या 2 में लिखे गए वाक्यात पूर्णरूप से असत्य व मिथ्या तथा बेबुनियाद होने से अस्वीकार है वादी ने मात्र दुरभावना से प्रेरित होकर गलत तरीके से प्रतिवादी को निकाषित करने के उद्देश्य से यह दर्ज किए हैं कि प्रतिवादी ने उक्त विवादग्रस्त दुकान मोटर पार्टस का व्यापार करने हेतु किराये पर ली थी प्रतिवादी ने अभी तीन साल से उक्त दुकान में व्यवसाय करना बन्द कर दिया है और प्रतिवादी ने दल्ले खॉ की चक्की के पास परिसर किराये पर लेकर अपना कार्यालय लगा दिया है तमाम तथ्य असत्य होने से अस्वीकार है क्योंकि प्रतिवादी ने उक्त दुकान व्यापार करने के लिए किराये पर ली थी जिसमें कुछ समय तक प्रतिवादी ने मोटर पार्टस का व्यापार किया था लेकिन अभी मोटर पार्टस में खास आमदनी नहीं होने की वजह से प्रतिवादी उक्त दुकान में पंचर गाडीयों की मरम्मत करने का कार्य कर रहा है उक्त कार्य से जो आमदनी होती है उससे प्रतिवादी एवम् उसके परिवार का भरण पोषण होता है । स्पष्ट है कि प्रतिवादी ने उक्त दुकान में व्यवसाय करना कतई बन्द नहीं किया है और न ही उक्त दुकान में पूर्णरूप से ताला बन्द रहता है । यह बात भी पूर्णरूप से असत्य होने से अस्वीकार है कि विवादग्रस्त दुकान का उपयोग नहीं करने के कारण विद्युत कनैक्शन कटा हुआ है बल्कि विद्युत कनैक्शन आज भी पूर्णरूप से चालु है । इसलिए प्रतिवादी उक्त आधार पर कतई काबिल बेदखली के नहीं है ।"

Thus, a combined reading of the two pleadings, makes it clear, that the plaintiff’s positive case is, that for the last around three years, the defendant has stopped the business, shop remains completely locked, and the defendant is not so using it, without any sufficient cause,

and he has shifted himself to other premises and other business, and on account of non user, the electricity connection has also been cut, while the case of the defendant positively is, that the defendant was carrying on motor parts business for some time. However, that business remaining not lucrative, he started the job of patching punctures, and that, the defendant has never closed the shop, nor the shop remains locked, and that electric connection was not disconnected, rather it is continuing in the moment.

It is significant to note, that the suit, as noticed above, was filed on 14.10.1993, while the written statement has been filed in January, 1996, though the defendant was served and had entered appearance on 3.8.1995. The pleadings of the plaintiff are, in present tense, obviously meaning thereby, that as on the date of the suit also the shop is closed, and according to the defendant, it never remained closed, and is continuously functional.

In this sequence I may now come to the evidence; the plaintiff P.W.1, in his examination in chief, has deposed that shop no. 5 is let out to the defendant, and for looking after his property, and recovering rent from the tenants, he has appointed Muneem Mangilal, who was given rent upto October, 1992. Then, he has deposed that

the defendant carried on business in the shop upto Dipawali, 1990, thereafter he stopped carrying on business in the shop, and closed the shop, and till the date of filing of the suit, the shop was not used, without any justification or reason, and the shop remained lying locked. The defendant removed his motor parts goods. Then, he has also deposed that the defendant has shifted to other premises. The plaintiff has been subjected to very lengthy cross examination, running into some six pages, and therein also, cross examination was directed on the aspect, as to whether the shop was taken only for carrying on motor parts business. Then, he was asked about his living in Bombay since 1948, which he admitted. Then, he was put about the shop being opened today, i.e. 13.9.1996, to which he deposed that today it is opened, and business is being carried on by Vinod Sabu, who is carrying on business for the last one and half years. He has deposed that he personally knows Vinod Sabu, and he has also deposed, Sabu being carrying on business of selling tyre tube and patching punctures. Then, he has maintained, that he had seen the defendant, last on the shop, some 10-12 years ago. He has denied the defendant to be carrying on business of selling tyre tubes and patching punctures in the suit shop. Thus, he has not at all been cross examined on the aspect of his evidence about shop having remained closed since Dipawali, 1990, and lying closed as on the date of the suit, nor about shop being continuously used. Obviously it

is not the case of the defendant, that the non user is for a period of not less than six months, or less than six months before filing of the suit. Then, coming to the statement of P.W.2, Muneem of the plaintiff, being Shri Mangilal: this witness has deposed about the defendant having last paid rent upto October, 1992, and about the defendant having closed the shop, three years before filing of the suit, and that no type of business was carried on in this shop, rather the shop was locked, and that the defendant did not carry on business in the shop for the last three years. The shop was closed because the defendant had closed the business, and shifted to other premises. In cross examination he has maintained, that while receiving rent in October, 1992, the defendant was found in Gehlot Bhawan, and he was not found on the shop in question. Then he was suggested about electric connection being operational, on the date of the statement, which he admitted. Thus, this witness has also not been cross examined on his testimony, about the shop being closed for the last three years, nor was he suggested about the defendant's stand, taken in written statement. It would suffice to observe, that it is established law, that if the part of statement of witness, is not assailed in cross-examination, the party cross examining shall be taken to have admitted that part of the evidence. In my view, thus from the evidence of the plaintiff, comprising of P.W.1 and 2, it is clearly established, that the shop was not used at

all, for any purpose, since Dipawali, 1990, till the date of the filing of the suit, which was filed on 14.10.1993, i.e. around three years, but definitely more than six months, before the date of the filing of the suit. As noticed above, the defendant has not suggested to the plaintiff, and his witness, his stand, about shop not remaining closed, or any business being continuously carried therein.

Now I proceed to examine the defendant's evidence also. D.W.1, the defendant Kalyan Singh, himself has deposed that the shop is operational even today, and is being run by himself. Then, he has deposed that he was earlier carrying on motor parts business, in which he sustained losses, and now he does the work of tyre tube and patching puncture, and that the plaintiff's representative did not come to him to receive rent after October, 1992. Then, he has deposed that the plaintiff has filed the false suit, with intention to enhance the rent, his shop never remained close, rather he is himself carrying on business in the shop, and that the electricity connection was never disconnected. Then, this witness was cross examined, wherein he has deposed to be carrying on contractor-ship business, and that, since 1992 he is the sole proprietor of this business, and that, his business was income tax assessee, and the firm is subsisting. Then, he has deposed, that he was carrying on business of auto parts in the name

of Mahendra Auto Parts, which firm has been closed some 7-8 years ago. Statement of this witness was recorded on 13.5.1997. It is admitted, that business of that firm was continued upto 1989-90, and thereafter it was closed. Then, he has deposed ignorance about books of accounts of that firm, this firm always ran into losses from 1970. Then, he has deposed that some 2-4 days after closure of the firm, he started the job of patching punctures of tyre tube, which is continuing till the date. On questions being put by the plaintiff to judge the reliability of this version, he has deposed that he had purchased the old machine for patching puncture from Kabari, for which no receipt was obtained, and he does not know the make of the machine, he has then deposed that he does not do the patching work himself, nor he ever did it, but has kept one Parminder Nai on salary of Rs. 1500/- per month. Significantly this is not the pleading of the defendant, even at the cost of repetition, it may be noticed, that defendant's positive case is, that he is carrying on the job of patching puncture of tyre tube. Then, he was asked about some diary or register about the income, which he denied to be keeping any. Then, he has denied that electricity connection was cut after closure of Mahendra Auto. However, he has admitted that he has applied for power connection in Electricity Department. Then, realising consequence of this admission, he tried to wriggle out, by deposing that Electricity Department never disconnected the supply,

rather the electricity line was got burnt, and for its repair he submitted application in the Electricity Department. Then, he has pleaded ignorance about the fact, as to whether any connection fee was charged by the Department. He has denied the suggestion about bills being sent by the Department with the report that the shop is closed for three years. Then, when he was asked about the bills of electricity charges, which would have shown that electricity connection having never cut, he has deposed that he did not take care of the bills. Then he was positively put, that the shop remained closed from 1989-90 to 1993, and remained locked, which suggestion was denied. Then, he has also denied the suggestion about the shop having been let out to Vinod Sabu after 1993. At this stage, I may notice, that a contention was raised by the learned counsel for the appellant, that the defendant was suggested about the shop remaining closed from 1989-90 to 1993, but it was not suggested about the shop remained closed upto the date of the suit. In my view, this submission also cannot be accepted, for the simple reason, that the parties were ad idem on the question, that the plaintiff’s case is about shop remaining closed upto the date of the suit, which was filed in the year 1993, and defendant’s case is not about the shop remaining closed for some time before filing of the suit, rather his case is, that shop never remained closed. In that view of the matter, the suggestion in cross-examination obviously has

to be construed as suggestion about closure of the shop till the date of the filing of the suit, else in any case the defendant would have answered that the shop remained closed before their filing of the suit, and was opened on the date of the suit. Then, he has tried to depose that Vinod Sabu carries on business of tyre in the adjoining shop. Significantly, to P.W.1 the suggestion was put about this Vinod Sabu carrying on business with the consent of the plaintiff. Thus, it is clear, that the testimony of this defendant was very much assailed in cross-examination. Of course, the suggestions were denied. Again significantly this Parminder is a new introduction by the defendant in his evidence, as he is neither there in the pleading, nor has it been suggested to the plaintiff, and then he has not been produced in the witness box. Then, comes D.W.2 Gordhanlal, who is tenant in the adjoining shop no.4, and has deposed that earlier the defendant was carrying on business in the name and style Mahendra Auto Parts, and now does the work of repairing tyre tube, and that the shop never remained closed, and remained closed for 2-4 days for some reason, and that he never saw electricity supply disconnected in the defendant’s shop. This witness has been cross examined on the side of the plaintiff, and has clearly admitted, that the defendant started the tyre tube repairing work five years ago. The statement of this witness was recorded on 11.8.97, while this is not the defendant’s case, that he started this job in 1992. Then,

he has improved on the defendant's version, by deposing that it is the defendant who opens the shop, and sits on the shop upto 1 noon. Significantly this is not the defendant's case any-where. Then, in cross-examination he has deposed, that from 1989 to 1993 Kalyan singh was doing the business of spare parts, and started tyre tube repairing work somewhere between 1994-95. Thus, even according to this witness the tyre tube repairing work was started after 1994, and auto-parts business was carried on till 1993, while according to the defendant himself, the auto parts business was closed in 1989-90. Much was sought to be argued, on the basis, that this witness was suggested about the shop having remained closed from 1989 to August 1993, while the suit has been filed in October 1993. In my view this submission cannot be accepted, in view of the fact, that this was not suggested to the plaintiff, and this is not the case of the defendant, that the shop remained closed upto August 1993, and was subsequently opened.

Thus, from the entire evidence of the parties, as considered above, in my view, it is clearly established, that the defendant did not use the suit premises without any reasonable cause for a period of around three years, from Dipawali 1990, up to the date of the filing of the suit. The version of the defendant, about his being continuously carrying on the work of tyre tube repairing

since the close of the business of Mahendra Auto Parts, also, does not inspire any confidence. In that regard there are varying versions, and varying evidence, about the time, when the business was commenced, its actual working, and so on. Much was sought to be argued on the basis, that even if Parminder is carrying on work of tyre tube repair, he is carrying on business on behalf of the defendant, and since in the cases cited, it has been held that defendant himself need not necessarily be available on the premises, ground of non-user is not made out. In my view, as an abstract principle it is alright, but then here the question is, of judging the reliability of the version of the defendant's carrying on business in the shop, as against the version of the plaintiff about the shop having remained completely locked, and in that sequence, the defendant has varying versions, as in the written statement he has pleaded to be himself carrying on business, while his witness D.W.2 deposed about the defendant himself opening the lock, and sitting on the shop upto about 1 noon. Then, in examination in chief D.W.2 does not talk about Parminder at all. In cross-examination only he has deposed that Parminder does the work, and the defendant sits upto 1 noon, and this Parminder has not been examined. Thus, the version of the defendant does not inspire any confidence.

Thus, even on the parameters laid down in various judgments cited by either side, and even on re-appreciation

of entire evidence, taking the burden of proof to be on the plaintiff to prove the non-user of the premises for a period of six months immediately before filing of the suit also, I am of the view, that the plaintiff has clearly proved the issue no.2 in his favour, and therefore, the same is required to be, and is, decided in favour of the plaintiff.

The net result is, that the appeal does not involve any substantial question of law, and the same is, therefore, dismissed.

However, at the request of the learned counsel, the appellant is granted one year's time to vacate the suit premises, on the conditions, that the defendant gives an undertaking before the learned trial court within one month from today, that on or before the expiry of the above period, he will peacefully hand over the vacant possession of the suit premises to the plaintiff, and that during this period, he will not, in any manner, transfer the possession of the suit premises to anybody. Likewise, the entire decreetal amount, so also all arrears of rent, if any, shall be deposited by the appellant in the trial court within one month from today, and shall further continue to deposit amount equal to the monthly rent, by way of damages for use and occupation, by 15th of each succeeding month, till the actual delivery of possession. In case the

appellant fails to comply with any of the above conditions, the respondent will become automatically entitled to execute the decree forthwith.

(N.P.GUPTA), J.